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SUGENTHIRAN PARAMASIVAM v. DEPUTY MINISTER OF HOME AFFAIRS, MALAYSIA & ORS

FEDERAL COURT, PUTRAJAYA
NALLINI PATHMANATHAN FCJ
MARY LIM FCJ
B HARMINDAR SINGH DHALIWAL FCJ
[CRIMINAL APPEAL NO: 05(HC)-97-05-2021(A)]
27 MARCH 2024

Abstract – *When s. 12 of the Dangerous Drugs (Special Preventive Measures) Act 1985 confers upon the Advisory Board the same powers as the court for the summoning and examination of witnesses, the administration of oaths or affirmations, and for compelling the production of documents, there must be Rules or Regulations made expeditiously detailing the related procedure. In the absence of express powers in the Rules or Regulations on such matters, the Board's power to regulate its own procedure simply means that it is not restricted to a prescribed form or procedure. In the present case, it would be reasonable to expect the Board to issue a letter to the relevant authorities or persons, summoning the attendance of identified persons for the purpose of the hearing.*

CRIMINAL PROCEDURE: *Habeas corpus – Appeal – Applicant detained for two years – Applicant applied for writ of habeas corpus at High Court – Allegations of inability to call material witnesses and non-compliance in matter of translation – Whether there was deprivation of rights – Whether there was effective and proper hearing – Whether there was non-compliance of provisions on preventive detention – Whether detention valid – Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6(1), 12 – Federal Constitution, arts. 5, 8 & 151*

The appellant was detained for a period of two years, pursuant to an order made by the first respondent, under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act'). The appellant applied for a writ of *habeas corpus* at the High Court, on the grounds that, *inter alia*, (i) he was deprived of his rights when he was not able to call three subpoenaed material witnesses to support his representation and/or defence and/or to prove his innocence to the Advisory Board ('Board'), pursuant to the requirements of s. 12 of the Act and arts. 5, 8 and 151 of the Federal Constitution ('FC'); and (ii) there was non-compliance of ss. 4 and 5 of the Act in the matter of translation and any translation, if done, was in fact by the same officer investigating the allegations against the appellant. The High Court dismissed the application. Hence, the present appeal.

Held (allowing appeal)
Per Mary Lim FCJ delivering the judgment of the court:

(1) There was a clear misapprehension to the prejudice of the appellant. The appellant had repeatedly sought the attendance of the two persons. Each time, it was refused by the Board which saw it fit to only subpoena the investigating officer. The Board left it to the appellant to apply directly to the detaining authorities or the prison authorities to secure the attendance of these persons. If those were not efforts towards impressing on the Board the importance of these witnesses to the appellant, it was difficult to see what else needed to be done. The High Court had also fallen into error. Any right to make representations within the intent and scope of art. 151 was only meaningful if the appellant was able to present his defence properly. Towards this end, the law had already anticipated that he may need to call witnesses; hence, the existence of s. 12 of the Act. This provision clearly empowered the Board to summon and examine witnesses, just like a court of law. This power could not and was not dependent on the Board enacting Regulations or any Rules of procedure before the Board may resort to those powers that, until Rules were made, the Board regulated its procedure by telling detainees, such as the appellant, to summon the witnesses themselves. (paras 28 & 29)

(2) In matters of preventive detention where the fundamental liberties of a person are compromised, there must be, in place, the procedure upon which the detainees may exercise his rights; in this case, the right to have witnesses summoned. Since such procedure was yet to be expressly enacted, the Board should just get on with processing the request instead of pushing it back to the appellant. The failure of the Board to accede to the appellant's request had prejudiced the appellant's rights under the FC. (para 36)

(3) The detainee, who did not have the opportunity to test out and challenge the allegations against him, as generally done in a court of law, and where he had been deprived of his liberty under art. 5, was entitled to expect strict adherence of the provisions of the law. An independent interpreter was necessarily called for; such person being disinterested in the subject matter and was a mere conduit, 'incapable of invention to the detriment of the accused'. Frequently, in a cosmopolitan and multi-racial nation such as ours, judges presiding over any case may be familiar with a particular language or dialect used by a witness in testimony. While the judge may point to a possible inaccuracy in the translation, the judge must never take over the task of translation itself. That would surely compromise the integrity of the proceedings as it was clearly in breach of the rules of natural justice. Similarly, in the case of

A the fourth respondent who was performing the task of investigation inquiring into the truth of the allegations against the appellant with the object of preparing a report and making certain recommendations relating the liberty of the detenu. Justice must not only be done but also be seen to be done. There must be strict compliance with the procedural
B rules when it comes to matters of preventive detention. There had been clear violations of the Act. (paras 42-45)

(4) The detention was clearly invalid. A writ of *habeas corpus* was issued and the appellant was released. (para 47)

C ***Bahasa Melayu*** *Headnotes*

Perayu ditahan untuk tempoh dua tahun, susulan perintah yang dibuat oleh responden pertama, bawah s. 6(1) Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985 ('Akta'). Perayu memohon writ *habeas corpus* di Mahkamah Tinggi, atas alasan, antara lain, (i) dia dinafikan hak-haknya
D apabila dia tidak dapat memanggil tiga orang saksi material yang disepina untuk menyokong representasinya dan/atau pembelaannya dan/atau membuktikan ketakbersalahannya pada Lembaga Penasihat ('Lembaga'), menurut syarat-syarat s. 12 Akta dan per. 5, 8 dan 151 Perlembagaan Persekutuan ('PP'); dan (ii) terdapat ketakpatuhan ss. 4 dan 5 Akta dalam hal
E perkara terjemahan dan apa-apa terjemahan, jika dibuat, hakikatnya dibuat oleh pegawai sama yang menyiasat dakwaan-dakwaan terhadap perayu. Mahkamah Tinggi menolak permohonan perayu. Maka timbul rayuan ini.

Diputuskan (membenarkan rayuan)
Oleh Mary Lim HMP menyampaikan penghakiman mahkamah:

F **(1)** Jelas terdapat kesilapan yang memprejudis perayu. Perayu berulang kali memohon kehadiran dua orang tersebut. Ini setiap kali ditolak oleh Lembaga yang berpendapat adalah sesuai untuk hanya mensepina pegawai penyiasat. Lembaga menyerahkan pada perayu untuk memohon secara langsung pada pihak berkuasa tahanan atau pihak berkuasa
G penjara untuk memastikan kehadiran individu-individu ini. Jika ini bukan usaha-usaha menekankan pada Lembaga akan kepentingan saksi-saksi ini, sukar untuk difikirkan apa lagi yang harus dibuat. Mahkamah Tinggi juga terkhilaf. Apa-apa hak untuk membuat representasi dalam niat dan rangkuman per. 151 hanyalah bermakna jika perayu boleh
H mengemukakan pembelaannya dengan betul. Bertujuankan ini, undang-undang telah memikirkan terlebih dahulu bahawa dia mungkin perlu memanggil saksi-saksi; ekoran itu, wujudlah s. 12 Akta. Peruntukan ini nyata memberi kuasa pada Lembaga untuk memanggil dan memeriksa saksi, seperti mahkamah undang-undang. Kuasa ini tidak boleh dan
I tidaklah bergantung pada Lembaga untuk menggubal Peraturan-peraturan atau Kaedah-kaedah tentang tatacara sebelum Lembaga boleh merujuk pada kuasa-kuasa tersebut bahawa, hingga Kaedah-kaedah

tersebut digubal, Lembaga menyelia tatacaranya sendiri dengan memaklumkan tahanan-tahanan, seperti perayu, untuk memanggil saksi-saksi sendiri.

(2) Dalam hal-hal perkara tahanan pencegahan apabila hak asasi seseorang individu terjejas, seharusnya tergaris satu tatacara yang, berdasarkannya, tahanan-tahanan boleh menjalankan hak-haknya; dalam kes ini, hak memanggil saksi-saksi. Oleh kerana tatacara sedemikian belum lagi digubal secara tersurat, Lembaga sepatutnya meneruskan dengan memproses permohonan tersebut dan bukan menolaknya pada perayu. Kegagalan Lembaga memenuhi permohonan perayu telah memprejudis hak-hak perayu bawah PP.

(3) Tahanan yang tidak berpeluang menguji dan mencabar dakwaan-dakwaan terhadapnya, seperti yang amnya dilakukan di mahkamah undang-undang, dan apabila dia dinafikan hak kebebasan bawah per. 5, dia berhak mengharapkan pematuhan ketat peruntukan undang-undang. Seorang jurubahasa diperlukan; individu sedemikian tiada kepentingan dalam hal perkara dan sekadar satu saluran yang 'tidak mampu mereka hingga menjejaskan tertuduh'. Di negara kosmopolitan dan berbilang kaum seperti Malaysia, hakim-hakim yang bersidang dalam apa-apa kes mungkin tahu selok belok satu-satu bahasa atau dialek yang digunakan oleh seorang saksi dalam keterangannya. Walaupun seorang hakim boleh menunjukkan kemungkinan ketidaktepatan dalam terjemahan, beliau tidak boleh mengambil alih tugas itu. Ini pasti menjejaskan integriti prosiding tersebut kerana jelas mencabuli kaedah keadilan asasi. Begitu juga dalam kes ini, responden keempat yang menggalas tugas menyiasat, untuk menyelidik kebenaran dakwaan-dakwaan terhadap perayu dengan matlamat menyediakan laporan dan membuat beberapa cadangan berkaitan kebebasan tahanan. Keadilan bukan sahaja perlu dicapai malah perlu dilihat tercapai. Mesti terdapat pematuhan ketat kaedah-kaedah tatacara dalam hal-hal perkara tahanan pencegahan. Jelas terdapat pelanggaran Akta.

(4) Penahanan ternyata tidak sah. Writ *habeas corpus* dikeluarkan dan perayu dibebaskan.

Case(s) referred to:

Cheong See Leong v. PP [1948] CLJU 169; [1948] 1 LNS 169 CA ***(refd)***

Collins Nwanganga v. Timbalan Menteri Dalam Negeri & Orsi (Criminal Appeal No: 05-251-10 of 2017 (B)) (Unreported) ***(refd)***

Fong Choon San v. Timbalan Menteri Dalam Negeri & Ors [2016] CLJU 788; [2016] 1 LNS 788 HC ***(refd)***

Kanagaeswaran Siwarpikasam v. Timbalan Menteri Dalam Negeri & Ors (Criminal Appeal No: 05-178-08-2017 (B)) (Unreported) ***(refd)***

Lim Wen Jeng v. Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Ors [2009] 1 CLJ 686 FC ***(not foll)***

A *Mohammad Azanul Haqimi Tuan Ahmad Azahari v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 8 CLJ 465 FC* ***(refd)***

Tamilarasan Subramaniam v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 10 CLJ 163 FC ***(not foll)***

Timbalan Menteri Dalam Negeri, Malaysia & Anor v. Awang Sari Lasikan (05(HC)-69-04-2021(B)) (Unreported) ***(refd)***

B

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(3), 4, 5(3), 6(1), 12, 14

Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987, rr. 5, 7, 10

C Federal Constitution, arts. 5, 8, 123, 151

For the appellant - Selvam Shanmugam, Surenthiran Raj & Yuganiya Rajalingam; M/s Selvam Shanmuham & Partners

For the respondents - Muhammad Sinti & Farah Ezlin Yusop Khan; SFCs

[Editor's note: For the High Court judgment, please see Sugenthiran Paramasivam
D *v. Timbalan Menteri Dalam Negeri Malaysia & Ors [2021] CLJU 1407; [2021] 1 LNS 1407 (overruled).]*

Reported by Najib Tamby

JUDGMENT

E **Mary Lim FCJ:**

Introduction

[1] On 15 September 2020, the appellant was detained for a period of two years pursuant to an order made by the first respondent under s. 6(1) of the
F Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316). The appellant was/is detained at Pusat Pemulihan Akhlak, Machang, Kelantan. The appellant applied for a writ of *habeas corpus* on the basis that his detention is illegal as the detention order made by the first respondent is null and void.

[2] Upon hearing learned counsel for the appellant and learned Senior
G Federal Counsel for the respondents, we unanimously allowed the appeal on two grounds and proceeded to issue a writ of *habeas corpus* for the immediate release of the appellant. We hereby elaborate on the two grounds.

Material Facts

H **[3]** The relevant facts leading to the detention of the appellant are well set out in the grounds of decision of the learned Judicial Commissioner. We summarise those facts as follows.

[4] The appellant was arrested on 23 July 2020. At the time of arrest, he was informed that he was said to be involved in drug trafficking activities in
I Taiping, Perak. The detention order that was subsequently issued on

15 September 2020 states that the appellant "pernah ada kaitan dengan aktiviti yang berhubungan dengan atau yang melibatkan pengedaran dadah berbahaya dan adalah perlu bagi ketenteraman awam supaya penama ditahan". This was amplified by the learned Judicial Commissioner – that "by allowing him to be free, at ease and at large, he would be menace to the society at large, endangering public order as drug trafficking activity would swell without bounds".

[5] The appellant moved the High Court at Taiping for a writ of *habeas corpus* on several grounds, amongst which are:

(i) that he was deprived of his rights when he was not able to call three material witnesses, namely Navendran a/l Suppiah, detained at Taiping Prison, Balan a/l Paramasivam, detained at the Simpang Rengam Pusat Pemulihan Akhlak, Johor, and Devan a/l Paramasivam, also a detainee, to support his representation and/or defence and/or to prove his innocence to the Advisory Board pursuant to the requirements of s. 12 of Act 316; arts. 5, 8 and 151 of the Federal Constitution even though his solicitors had applied to the Advisory Board to issue subpoenas against these witnesses;

(ii) that he was deprived a fair trial at the hearing of his representations on 17 November 2020 given that the evidence of these three material witnesses could not be heard;

(iii) that consequently, there was no effective and proper hearing of his representation contrary to the provisions of arts. 5, 8 and 151 of the Federal Constitution; and

(iv) that there was non-compliance of ss. 4 and 5 of the Act 316 in the matter of translation, as requested by the appellant; and that any translation, if done, was in fact by the same officer investigating the allegations against the appellant.

[6] By a separate interlocutory application, the appellant had also sought sight of the lock-up diary, contending that it would prove that the order of detention was not served on him at the place as stated in the order. He had also asked for production of the notes of proceedings at the inquiry. Both requests were refused and the application was dismissed. The absence of these documents was cited as additional complaints for the issue of a writ of *habeas corpus*.

[7] As mentioned at the outset, we had allowed this appeal on two grounds and these were, the refusal to issue the subpoenas summoning the attendance of material witnesses for the appellant, and the matter of translation by the same person conducting the investigations. We did not find merit in the remaining grounds of complaint.

A **Summoning Of Witnesses**

[8] The appellant's request for summoning the persons he regarded as material witnesses, that is, the persons whom he reasonably believed will exculpate him from the allegations made against him, was made to the Advisory Board. He had named Navendran a/l Suppiah, detained at Taiping
B Prison, Balan a/l Paramasivam, detained at the Simpang Renggam Pusat Pemulihan Akhlak, Johor, and Devan a/l Paramasivam, also a detainee, to support his representation and/or defence and/or to prove his innocence to the Advisory Board. The appellant had not only identified the persons he needed for the inquiry, he had also indicated where these individuals may
C be found.

[9] In response to his request, which was not suggested to be in the least unreasonable, the Advisory Board refused to issue subpoenas and left it to the appellant to compel or obtain the attendance of these persons; that it was for the appellant or his lawyer to deal with the relevant parties including the
D prison officials to ensure the attendance of these persons who were themselves, detainees.

[10] The appellant contended that this refusal to issue subpoenas under s. 12 amounted to an outright violation of his right to a fair hearing under arts. 5, 8 and 151 of the Federal Constitution. His right to a fair and effective
E representation was prejudiced as a result of this refusal as his representation to the Advisory Board was without witnesses who were paramount to supporting his defence.

[11] Apparently, the hearing of the appellant's representation took place on
F 17 November 2020 at Pusat Pemulihan Akhlak, Machang, Kelantan. The appellant invited the High Court to draw an adverse inference to this refusal, especially since the burden was on the respondent to justify the detention (see *Mohammad Azanul Haqimi Tuan Ahmad Azahari v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 8 CLJ 465; [2019] 5 MLRA 1).

G **[12]** The High Court refused, opining that s. 12 was only triggered when the witnesses are able and willing to come and testify before the Advisory Board. Relying on *Lim Wen Jeng v. Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Ors* [2009] 1 CLJ 686; [2009] 1 MLJ 445; [2008] 2 MLRA 748, there must be materiality in the evidence to be offered by these potential
H witnesses; and the appellant ought to have impressed upon the Advisory Board on this issue of materiality, that it, the Board would not be able to reach a just and fair decision unless the testimonies of these persons were obtained. Since the appellant or his representative failed to do that, he could not now blame the Board.

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[13] We appreciate that this issue under s. 12 of the Act 316 has been raised in several previous challenges; the most recent being *Tamilarasan Subramaniam v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 10 CLJ 163; [2021] 6 MLJ 147; [2021] 6 MLRA 294 where this court held amongst others that it was not a mandatory procedural requirement for the Advisory Board to accede to a request by a detainee to summon witnesses whom he wished to call at the representation hearing. The decision in *Lim Wen Jeng v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2009] 1 CLJ 686; [2009] 1 MLJ 445; [2008] 2 MLRA 748 discussing a similar provision in the Emergency (Public Order and Prevention of Crime) Ordinance 5 of 1959 was followed in *Tamilarasan*.

[14] In *Lim Wen Jeng*, it was held that the Advisory Board could not be compelled to exercise its discretionary power to issue subpoenas applied for by the detainee. If the detainee wished the presence of such witness, it was for the detainee to make the witness available at the hearing; there was no obligation on the Board to summon such witnesses.

[15] We appreciate that two other decisions, namely *Kanagaeswaran Siwarpikasam v. Timbalan Menteri Dalam Negeri & 2 Lagi* (Criminal Appeal No. 05-178-08 of 2017 (B)) and *Collins Nwanganga v. Timbalan Menteri Dalam Negeri & 2 Lagi* (Criminal Appeal No. 05-251-10 of 2017 (B)) were cited in sharp contrast to *Lim Wen Jeng*. In these two decisions decided, the Federal Court had allowed both appeals on the ground that the Advisory Board's refusal to exercise its power to summon witnesses on application by the appellant was a wrong exercise of discretion. The Federal Court however, declined to follow these two other decisions and chose instead to follow *Lim Wen Jeng*, for the particular reason that there were no written grounds available to discern the basis for those two decisions.

[16] We, on our part, decline to follow *Tamilarasan*. The decision has in any event, been overruled in respect of the matter of computation of time under s. 3(3) of the Dangerous Drugs (Special Preventive Measures) Act 1985 in *Timbalan Menteri Dalam Negeri, Malaysia & Anor v. Awang Sari bin Lasikan* (05(HC)-69-04-2021(B)) on 7 December 2021 (*Awang Sari*).

[17] In the brief grounds for its decision, the Federal Court explained that Tamilarasan and another decision, *Lock Wee Kok* were "not good law" on the issue of delay because:

> (a) A reading of the Act clearly envisages that the Minister must make regulations detailing time limits. Where he has failed to do so, then the Interpretation Acts come into play meaning as expeditiously as possible – that is an objective test to be determined by the Court when considering all of the circumstances. It will vary from case to case. This is the ratio of *Chua Kian Voon*. *Tamilarasan* is wrong in law because it fails to consider that the subsistence of a time limit

is envisaged by the statute itself, but not regulated as yet by the Minister. That means a time limit was envisaged to be stipulated within the 60-day period. That in turn means that a specific time period was clearly envisaged to comprise the time within which the relevant report has to be made. And that time limit falls well within the 60-day period. So, it is incorrect to suggest that because the Minister has not stipulated a time, it follows that time is at large. Neither does it follow that any time within the entire 60-day period is acceptable. Rather, the failure by the Minister to prescribe regulations on time, warrants even greater scrutiny by the Courts to ensure that matters are not left at large for the entirety of the 60-day period which is what the case appears to imply;

(b) These cases (*Tamilarasan* and *Lock Wee Kok*) fail to give any consideration to the purpose and object of the statute, which is required under the Interpretation Acts and the general law relating to statutory interpretation. The object of the statute is to preventively detain a person but only if it is the case that there is sufficient reason to do so under the preventive detention legislation promulgated under Art 149. And that in turn is because it adversely affects, or negates the liberty of a person. As such it is not permissible to construe the statute without taking into effect this fundamental issue. It is because the liberty of a person is put in peril that time is not at large – the officers who are in charge of making the respective reports are required to prioritise these cases because the liberty of a person whose rights as a citizen are entitled to full recognition under the FC must be respected. In other words, if excessive time is taken over the production of the requisite reports it will affect the duration of the detention time. Meaning that if the reports are issued early, the Minister may decide NOT to detain and the person will be released immediately. *Chua Kian Voon* recognises this. *Tamilarasan* and *Lock Wee Kok* do not. The result in applying *Tamilarasan* is that various officers during the process are at liberty to take as long as they want, thereby depriving the liberty of a person who may not eventually be detained, and placing undue burden on the latter parts of the process which will have to be effected hastily in order to meet the 60-day deadline. In other words, is it in order for the first report to be issued 45 days after the detention and everything else hurried after that, such that fundamental matters will have to be rushed through? That cannot rationally be the function and purpose of the Act.

[5] If the construction that mere procedural review is the only basis on which to examine these ministerial orders, then extremely strict compliance is required.

[18] In respect of the matter of summoning witnesses, we also decline to follow the decisions reached in *Tamilarasan* and *Lim Wen Jeng*; principally for the same reasons set out in *Awang Sari*, that is, the use of a purposive interpretation of the relevant provisions and there being due regard for the

protection of fundamental rights under the Federal Constitution. It is therefore timely and appropriate that we relook at the relevant provisions, closely.

[19] The whole regime on preventive detention in the Act 316 is to be found in Part II – "Powers of Preventive Detention". The provisions deal with the whole range of matters starting from the detention and restriction of a person without warrant, investigations by the police officer, inquiries by the inquiry officer including the power to summon and examine witnesses as well as administering oaths or affirmations for that purpose, preparation of reports by the police officer and the inquiry officer, detention orders by the Minister, representations against such orders to the Advisory Board, powers of review by the Advisory Board, preparation of reports by the Advisory Board; just to name some principal provisions.

[20] Then, there is s. 12. Similar to the powers given to the inquiry officer in s. 5(3), s. 12 expressly empowers the Advisory Board to summon and examine witnesses, administer oaths or affirmations and compel production of documents:

> **Power to summon witnesses**
>
> 12. Every Advisory Board shall, for the purposes of this Act, but subject to section 14, have all the powers of a court for the summoning and examination of witnesses, the administration of oaths or affirmations, and for compelling the production of documents.

[21] Section 14 deals with disclosure of information, that there is protection against disclosure where it is against the national interest to produce or disclose. This provision is not engaged in the circumstances of this appeal. But, s. 12 is.

[22] To facilitate the carrying out of its functions under the Act 316, the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 have been enacted. These Rules attend to matters such as the procedure for making representations, the form representations are to take, hearing of representations, and the procedure for review of detention and restriction orders. The detainee has a right to be physically present with or without counsel at these representations aside from a right to orally address the Board either to substantiate or amplify the grounds or reasons why the detention should cease (r. 5). The hearings are all conducted in camera (r. 7).

[23] Rule 10 is of particular relevance and it reads as follows:

> 10. (1) Subject to the provisions of the Act and these Rules, where any matter is not expressly provided for by these Rules, the Board may regulate its own procedure.

A (2) In particular, but without prejudice to the generality of paragraph (1), the Board may, having regard to the circumstances of security, in its discretion determine:

(a) whether the evidence of any should be heard in the presence of a detained person or his representative or both;

B (b) whether any police officer should be required to appear before the Board in the presence of a detained person or his representative, or both; and

(c) whether any document or other information should be made available or disclosed to a detained person or his representative, or C both.

[24] No regulations or rules have been made dealing expressly with the powers in s. 12 in which case, it is left to the Board "to regulate its own procedure". In other words, it is left to the Board to decide how or what the procedure is to be.

D **[25]** The Board has not indicated how the procedure on summoning and examining witnesses under s. 12 is to proceed save that because there are no rules expressly made on the matter, it responded in the way that it did, that is, the appellant was to summon the witnesses himself or deal with the relevant authorities to secure attendance of potential witnesses.

E **[26]** In our view, such a response is far from satisfactory and is ground for the grant of the order of *habeas corpus* as it effectively renders the protection in s. 12 and also art. 151 of the Federal Constitution, illusory. It may even equate to a dereliction of the powers *cum* responsibilities provided in s. 12. The power to summon and examine witnesses, the administration of oaths F or affirmations, and to compel the production of documents is innate to a proper hearing of representation as to why a detention order should cease or not cease.

[27] If the Advisory Board can accede to the request of the detaining G authorities, it makes no sense why it cannot do the same for the appellant. After all, how difficult is it to issue a letter summoning a person to appear before the Board, be examined; or to appear and produce certain documents. It is the entity summoning the attendance for examination that matters, not the form. Neither the appellant nor his counsel is in the position to summon any person, let alone persons in the name of Navendran a/l Suppiah, H detained at Taiping Prison, Balan a/l Paramasivam, detained at the Simpang Renggam Pusat Pemulihan Akhlak, Johor, and Devan a/l Paramasivam, also a detainee, to attend the hearing. That will also run contrary to the clear terms in s. 12 and any summoning by the appellant or his counsel may, arguably, be of no effect or force.

I

[28] On the facts, there was clearly a misapprehension to the prejudice of the appellant. The appellant had repeatedly sought the attendance of these two persons. Each time, it was refused by the Advisory Board who saw it fit to only subpoena the investigating officer. The Board left it to the appellant and his counsel to apply directly to the detaining authorities or the prison authorities to secure the attendance of these persons. See letters dated 23 October 2020 and 27 October 2020 from the appellant to the Advisory Board. If those are not efforts towards impressing on the Board the importance of these witnesses to the appellant, it is difficult to see what else needs to be done.

[29] On the law, the High Court also had fallen into error. Any right to be make representations within the intent and scope of art. 151 is only meaningful if the appellant is able to present his defence properly. Towards this end, the law has already anticipated that he may need to call witnesses; hence the existence of s. 12. This provision clearly empowers the Advisory Board to summon and examine witnesses, just like a court of law. This power cannot and is not dependent on the Board enacting regulations or any rules of procedure before the Board may resort to those powers, that until rules are made, the Board regulates its procedure by telling detainees such as the appellant to summon the witnesses themselves. Should that be the proper reading, then the Board's summoning of the investigating officer itself begs reasoning, given that it arises from the same power.

[30] In our view, the Board's response to the appellant is unacceptable. Now, who is the Advisory Board?

[31] The Act 316 defines in s. 2 that the "Advisory Board" means an Advisory Board constituted under cl. (2) of art. 151 of the Constitution for the purposes of that article. Article 151 reads as follows:

> **Restrictions on preventive detention**
>
> 151. (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention:
>
> (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;
>
> (b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer periods as the Yang diPertuan Agong may allow.

(2) An advisory board constituted for the purpose of this Article shall consist of a chairman, who shall be appointed by the Yang d-Pertuan Agong and who shall be or have been, or be qualified to be, a judge of the Federal Court, the Court of Appeal or a High Court, or shall before Malaysia Day have been a judge of the Supreme Court, and two other members who shall be appointed by the Yang di-Pertuan Agong.

(3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

[32] The Federal Constitution clearly confers a right to a detainee to hear the reasons for his detention, the allegations of fact upon which a detention order is made; and of paramount importance, affords him an opportunity to make representations against the order of detention. These are constitutional safeguards which must be observed by all involved in the process.

[33] It is also worthwhile noting that representations are made not to a faceless entity but to an advisory board whose chairman has to be someone who is legally qualified to be a judge, be it of the High Court, Court of Appeal or Federal Court. Under art. 123 of the Federal Constitution, a person is qualified to be a judge of the Federal Court, Court of Appeal or High Court if the person is a Malaysian citizen with ten years' experience, be it as an advocate or a member of the judicial and legal service. In short, the chairman is someone with adequate legal or judicial experience and seniority and would either be familiar with or at least be in the position to obtain necessary information about court proceedings, and the business of fact finding and application of the law to the facts. This aspect seems to have escaped the attention of the respondents, that the responsibility of chairing an advisory board is entrusted by the Federal Constitution on what it believes would be the most appropriate person to guide and helm the Board.

[34] Consequently, when s. 12 confers upon the Board the same powers the court has for the summoning and examination of witnesses, the administration of oaths or affirmations, and for compelling the production of documents, there must be rules or regulations made expeditiously detailing the related procedure. In the absence of express powers in the Rules and Regulations on such matters, the Board's power to "regulate its own procedure" simply means it is not restricted to a prescribed form or procedure.

[35] For the present purpose, it would be reasonable to expect the Advisory Board to issue a letter to the relevant authorities or persons, summoning the attendance of identified persons for the purpose of the hearing. As mentioned earlier, neither the appellant nor his counsel would be in the position to invoke the powers under s. 12 unto themselves. That power is reposed in the Advisory Board and their dereliction clearly prejudiced the rights of the appellant to a fair hearing and the opportunity to make representations as provided in the Act 316 and the Federal Constitution.

[36] In matters of preventive detention where the fundamental liberties of a person are compromised, there must be in place, at the very least, the procedure upon which the detainees may exercise his rights, in this case, the right to have witnesses summoned. Since such procedure is yet to be expressly enacted, the Advisory Board should just get on with processing the request instead of pushing it back to the appellant. The failure of the Board to accede to the appellant's request has, in our view, prejudiced the appellant's rights under the Federal Constitution.

Tamil Interpreter

[37] The complaint here is this – the appellant had sought to speak in Tamil, his mother tongue during the course of the investigation. The investigating officer decided to "doubled up the role as a Tamil interpreter" since he was also Tamil speaking. The recording of the statement under the Act 316 was thus conducted with the investigating officer performing dual tasks of asking questions and translating those same questions to and then the answers from the appellant. "Due to inadvertence, the IO did not state in the requisite column in the statement made by the detenu, that he was the interpreter too. As iterated by the IO in his affidavits, it was purely inadvertence on his part". The appellant claimed that he was aggrieved, his detention was unlawful and void *ab initio* as he was prejudiced by the failure of the IO to comply with the mandatory provisions of the Act 316.

[38] Once again, the High Court disagreed. According to the High Court:

> It is bizarre at this age and time for a citizen of this country, including the applicant not to be able to understand Bahasa Malaysia … it would only be befitting for the investigating officer (IO) of his case to explain and interpret to him in the Tamil language and not Bahasa Malaysia. It is asserted that he had requested for a Tamil interpreter but not provided one. What has been forgotten is the stark fact that at the phase of investigation, the IO … had employed a dual role, both as an investigator and Tamil interpreter to assist the applicant. He had interpreted and explained the questioning and examination as required under section 4 of Act 316 which took place in Bahasa Malaysia into the Tamil language. This is done to ensure that the applicant at all times, understands and appreciates the questioning, examination and investigation of the case against him.
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> [14] …
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> [15] In fact, there is no procedural requirement for the inquiry officer to have the inquiry done and interpreted to the applicant in the Tamil language. But if the detenu request for one, then he has to oblige. In the present case, there had been no request made …
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> [6] …

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> [17] … Of course, the applicant is entitled to speak in the language he is conversant with. But he had no qualms of speaking in the National Language, *albeit* him requesting for a Tamil interpreter. The same could not be undertaken by the Inquiry Officer, as he is conversant in Bahasa Malaysia …

B **[39]** Essentially, the learned judge disbelieved the appellant had requested for a Tamil interpreter at the material time. However, it stands to reason that one must have been requested, that there was an issue with language. Otherwise, the IO would not even have done any at all to start with. Surely, he did not do so for altruistic reasons, but for the request of the appellant. Hence, the fourth respondent's admission to his failure to sign off in the C particular column of the report. The learned judge was clearly in error in his evaluation of these facts.

[40] The whole purpose of the investigations under s. 6 of the Act 316 is towards a preparation of a report for the Minister to decide whether a D detention or restriction order needs to be issued against a detainee. Here, the investigating officer, as the inquiry officer would be investigating the allegations of fact and basis reached by the police officer as set out in his report under s. 3. His sole function is to investigate whether there are "reasonable grounds for believing that such person has been or is associated E with any activity relating to or involving the trafficking in dangerous drugs", as provided in s. 6. This is an extremely important function with an equally onerous responsibility which must be undertaken with the utmost care and observance of the twin rules of natural justice; that is, the rule against bias and the right to be heard. This right is implicitly recognised and safeguarded in art. 151, as set out in the earlier part of this judgment.

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[41] With this, it is quite clear that the fourth respondent, no matter what his good intentions may be, the dual function that he performed while investigating the truth of the allegations of fact and reasons have indeed compromised the integrity of the investigations. These investigations which G in turn led to the preparation of the report upon which the Minister then determined that the appellant should be detained according to the terms as set out in the detention order, is the substratum of the whole detention order.

[42] There are reasons why there is a need for the identification of a translator where one is used; it is obviously to ensure that the rights and H protection afforded under the Federal Constitution are not mere platitudes but respected and honoured on the facts. The detainee who does not have the opportunity to test out and challenge the allegations against him (generally done in a court of law) and where he has been deprived of his liberty under art. 5, is entitled to expect strict adherence of the provisions of the law.

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[43] An independent interpreter is necessarily called for; such person being disinterested in the subject matter and is a mere conduit, "incapable of invention to the detriment of the accused", to quote the words of Spenser Wilkinson J in *Cheong See Leong v. PP* [1948] CLJU 169; [1948] 1 LNS 169; [1948-1949] Supp MLJ 56, applied well in *Fong Choon San v. Timbalan Menteri Dalam Negeri & Ors* [2016] CLJU 788; [2016] 1 LNS 788; [2017] 7 MLJ 440, [2016] 6 MLRH 323.

[44] Frequently, in a cosmopolitan and multi-racial nation such as ours, judges presiding over any case may be familiar with a particular language or dialect used by a witness in testimony. While the judge may point to a possible inaccuracy in the translation, the judge must never take over the task of translation itself. That will surely compromise the integrity of the proceedings as it is clearly in breach of the rules of natural justice.

[45] Similarly, in the case of the fourth respondent who was performing the task of investigation inquiring into the truth of the allegations against the appellant with the object of preparing a report and making certain recommendations relating to the liberty of the detenu. Justice must not only be done but also be seen to be done.

[46] As ruled in *Awang Sari*, there must be strict compliance with the procedural rules when it comes to matters of preventive detention. There have been clear violations of the provisions of the Act 316.

Conclusion

[47] For these reasons, the detention is clearly invalid. A writ of *habeas corpus* is thus issued and the appellant is released forthwith.